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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1837

JAMES B. PACKARD, *Petitioner,*

vs.

KENNETH WELCH, ROBERT HUNTER, DENNIS SCHERZINGER, ROBERT MULLIKIN, and ROBERT WHYTE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, In Propria Persona, prays that a Writ of Certiorari issue to the Ninth Circuit Court of Appeals to review the Order in its Memorandum entered in above entitled case April 15, 1976, affirming district court's Order denying vacation of the dismissal.

OPINIONS BELOW

April 15, 1976—Memorandum by Ninth Circuit Court of Appeals.

May 12, 1976—Petition for Rehearing denied.

July 7, 1976—Order denying motion to vacate and set aside judgment and Order granting motions to dismiss action.

JURISDICTION

USCA Title 28-1254(1)—United States Supreme Court review of civil case order by court of appeals by means of writ of certiorari.

USCA Title 28-2101(c)—Application for writ of certiorari within 90 days after court of appeals order.

USCA Title 28-2106—(Title) Determination
The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Appellate Court Jurisdiction

USCA Title 28-41—Appeals from the United States District Court for the Eastern District of California (Sacramento) to Ninth Circuit Court of Appeals.

USCA Title 28-1291—Appeal from a district court order.

United States District Court Jurisdiction

U.S. Const. Art. III, Section 2 (1)—Jurisdiction of the United States Courts extends to all cases in law and equity arising under this Constitution and the laws of the United States between citizens thereof.

USCA Title 28-84 (b)—Solano County within boundaries allocated to California Eastern District Court (Sacramento). City of Vallejo in Solano County. All defendants and plaintiff do business in City of Vallejo, California.

USCA Title 28-1343 (3) and (4)—Civil Rights.

USCA Title 42-1983—Civil Action for Deprivation of Rights.

USCA Title 18-242—Deprivation of Rights Under Color of Law.

U.S. Const. Art. I (10) (1)—No State shall pass any law impairing the obligation of contracts.

QUESTIONS PRESENTED

1. Is *Schepp v. Langmade,* 416 F. 2d 276, 279 (9th Cir. 1969) relative to this case?
2. Is FRCP Rule 60 (b) a substitute for appellate review?
3. Is petitioner's motion to vacate made under FRCP Rule 60 (b) (1) timely?
4. Is district court's failure to make findings of facts and conclusions of law excusable?

5. Has petitioner met the standards for extraordinary relief under FRCP Rule 60 (b) (6)?

6. Does USCA Title 18-242 provide a remedy for violation of United States Constitution provisions under color of laws?

7. D'd district court abuse its discretion by not granting petitioner's motion to vacate pursuant to FRCP Rule 60 (b)?

STATEMENT OF CASE

This Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is the second petition concerning this United States District Court for the Eastern District of California case Civil No. S-2978. The first petition for writ of certiorari was United States Supreme Court case No. 74-1135. Petitioner (plaintiff-appellant in lower court) begins the Statement of Case for this petition from the United States Supreme Court decision dated April 28, 1975, Hearing Denied, "Mr. Justice Douglas took no part in the consideration or decision of this petition."

On May 28, 1975 plaintiff-appellant filed in district court his motion to vacate and set aside judgment rendered May 8, 1974 and order granting motions to dismiss action filed April 17, 1974. CT 154. The motion was made under the provisions of FRCP Rule 60 (b) (1) and (6). Four of the respondents (defendants-appellees in lower court) filed Memorandum of Points and Authorities in opposition to the motion

on June 16, 1975. Plaintiff filed a Reply on July 1, 1975. Hearing was held on plaintiff's motion on July 7, 1975 in district court, Sacramento. All defendants were represented, and district court signed the order denying plaintiff's motion presented by Attorney Della Santa at the hearing. CT 181.

August 4, 1975 plaintiff-appellant filed a timely Notice of Appeal to the Ninth Circuit Court of Appeals. The appeal was from the order denying plaintiff's motion to vacate made under FRCP Rule 60 (b) (1) and (6). The clerk of the Ninth Circuit Court of Appeals filed the record from district court on October 2, 1975 assigning the case number 75-2752.

Petitioner filed his Appellant's Brief on or about October 31, 1975. Subsequently, within about a week all appellees sent letters to the appellate court waiving their right to file a brief in opposition to Appellant's Brief stating that "the appeal is utterly without merit as is apparent from the brief and record now on file."

On April 13, 1976 Oral Argument was held before Ninth Circuit Court Judge Barnes, Browning and Wright.

At the hearing it was announced that Appellant's motion to supplement the record had been granted concerning district court's formal grant of permission to plaintiff dated February 4, 1974 to file an Amended Complaint, which was not a part of district court's file on record.

The time interval between November 1975 and April 13, 1976, the date of the Oral Argument hearing

was explained in correspondence between Clerk Melfi and petitioner that the appellate court did not consider the case fully briefed.

On April 15, 1976 the appellate court filed its Order in its Memorandum affirming the order (CT 181) of the district court denying vacation of the dismissal.

On or about April 22, 1976, petitioner filed a petition for rehearing. On or about April 29, 1976 respondents Welch and Hunter file a Memorandum of Points and Authorities in Opposition to petitioner's petition for rehearing, which apparently was not received. However, along with the Memorandum of Points and Authorities in Opposition to Appellant's Petition for Rehearing, respondents Welch and Hunter also submitted a motion for attorney fees.

On May 10, 1976 the petition for rehearing was denied and the motion for attorney's fees was also denied without any opposition from petitioner being filed.

ARGUMENT

I

Schepp v. Langmade, 416 F.2d 276, 279 (9th Cir. 1969) is cited in Memorandum as authoritative reference for the statement "that the grant or denial of a motion to vacate a prior order pursuant to Fed. R. Civ. P. 60 (b) is within the sound discretion of the district court." Appellant suggested in his Petition for Rehearing page 2 that *Schepp v. Langmade* had no relation to this case at bench. In the *Schepp v. Langmade* case the appeal was from the denial of a

60 (b) (2) motion. No notice of appeal had been filed prior to the 60 (b) (2) motion so there was no appeal pending. The 60 (b) (2) motion was filed seven months after judgment was entered (P. 278) and was timely according to the 60 (b) (2) one year provision, "not more than one year after the judgment was entered." The appellate court ruled that the 60 (b) (2) motion could not be used as a substitute for a 59 (b) motion (P. 279). The time for such motion having long since passed (10 days after entry of the judgment in district court). The reason a 59 (b) motion would have had to be used, the case actually went to trial and the court established a fact from the trial. A procedural irregularity concerning the trial was the question on appeal for a new trial.

This petitioner is claiming that district court abused its discretion in not granting his motion made under 60 (b) (1) and (6). Petitioner is also claiming that the district court abused its discretion in not making findings of fact and conclusions of law. See CT 181 where district court denied plaintiff's motion to vacate on basis "the Court being fully advised."

From the above is the *Schepp v. Langmade* case relative to this case at bench? No. There is no 59 (b) situation in this petitioner's case. Petitioner is claiming a 60 (b) (1)—mistake—situation, not 60 (b) (2). Petitioner actually corrected his claimed mistake in his Amended Complaint (A/C) pleadings in his 60 (b) (1) motion. See CT 168, lines 1-28. Also, petitioner requested the cooperation of the court to help him correct his mistake.

Quoting from CT 167, lines 27-33: "Does plaintiff's Amended Complaint (A/C) filed 2/19/74 state a claim upon which relief can be granted? No. Why? Because in plaintiff's A/C plaintiff made the mistake of accusing all defendants of impairing his obligations concerning plaintiff's contracts, instead of stating that all defendants are impairing their obligations concerning plaintiff's contracts. See *Cobb v. City of Malden,* 202 F.2d 701 for teacher's mistake." In Petitioner's Petition for Rehearing page 4 petitioner added the case *Southern Terminal v. E.P.A.,* 504 F.2d 646, 680 (1st Cir. 1974), in which nine attorneys did not discover their pleadings mistake until after the 1st Cir. Court decision.

II

The only relativeness that this petitioner can see of the *Schepp v. Langmade* case to this case at bench is the jurisdiction is alleged to be the same i.e. 28 U.S.C. §1291. However, on rereading the *Schepp v. Langmade* case this appellant notes a similarity of the Arizona Statute of Frauds provision cited at page 277 and the California Revenue and Taxation Code Section 6931 cited at CT 59, lines 3-8, concerning the Utility Users Tax.

In light of 28 U.S.C. §1341 and Calif. Rev. and Tax. Code Section 6931 this petitioner had no plain, speedy and efficient remedy concerning the imposition on his utility contracts of the utility users tax in state court.

In light of 28 USC §1341 the cases cited on how Calif. R. & T. Code Section 6931 has been handled

previously cited by this petitioner (not a part of this record on appeal, CT 59, lines 14, 15) are as follows:

So. Pac. v. Corbett, 20 F.Supp. 951 (1937);
Cooney v. Mountain States Tel. & Tel., 79 L.Ed. 939 (1935);
S.B.E. v. Goggin, 191 F.2d 726 (1951);
P.T.&T. v. Tax Comm., 80 L.Ed. 760.

In light of 28 USC §1342 this petitioner had no plain and speedy remedy in his state court cases concerning the rate orders chargeable by a public utility and filed with the Public Utilities Commission of the State of California, a state administrative agency; and the rate orders enforced by officers of the public utilities defendants Mullikin (PGE) and Whyte (PTT) and his contracts.

In light of 28 U.S.C. §1342 this petitioner had no plain and speedy remedy in his state court cases concerning rates chargeable by orders in form of city ordinances and VSFCD ordinance and resolutions promulgated by the Vallejo City Council and Vallejo Sanitation and Flood Control District (VSFCD) Board of Trustees respectively, both rate making bodies of a state political subdivision and the chargeable rates enforced by government officials defendants Welch, Hunter and Scherzinger on petitioners' contracts.

This petitioner claims district court's jurisdiction (CT 3 and CT 169, lines 1-6) of this case is 28 USC §1343 (3) in conjunction with 42 USC §1983, and 28 USC §1343 (4) in conjunction with 18 USC §242.

Also U.S. Const. Art. I (10) (1) "No State shall pass any law impairing the obligations of contracts."

From the above it appears that the only plain, speedy and efficient remedy this petitioner has is here in Federal Court for respondents impairing their obligations under color of laws concerning petitioner's contracts.

In the *Schepp v. Langmade* case at page 278 the district court found a breach of obligation. In this case district court has found no facts and made no conclusions of law concerning petitioner's contracts; but this petitioner is claiming impairment of the obligation of contract by all respondents under color of laws, not breach of obligation.

III

In its Memorandum the appellate court said "Rule 60 (b) is not a substitute for appellate review", page 2, which shows that the appellate court panel does not understand the meaning of the 60 (b) (1) provision "and for reasons (1), (2) and (3) not more than one year *after* the judgment, order, or proceeding was entered or taken." "Proceeding was taken" means an appeal was completed (CT 177, lines 6-8). The one year *after* means within one year *after* the United States Supreme Court decision became final in this case. A 60 (b) (1) motion can be used as a substitute for appellate review especially when the decision on appellate review strongly indicated that a mistake was made in the pleadings by this petitioner. See Pet. for Reh. page 4, lines 5-7.

The Supreme Court decision was made April 28, 1975. CT 153. No Petition for Rehearing was filed. Petitioner filed his motion to vacate made under FRCP Rule 60 (b) (1) in district court May 28, 1975 timely.

IV

The Ninth Circuit appellate court stated in its Memorandum that petitioner's motion made under Rule 60 (b) (1) was untimely "since it came more than one year after the entry of the original order."

This petitioner in his Petition for Rehearing cited the cases *Corn v. Guam Coral,* 318 F. 2d 622, 628, 629, 631, 632, *Hirsch v. U.S.,* 186 F. 2d 524 and *Lloyd v. Lawrence,* 60 F.R.D. 116, 118 to refute the appellate court's contention that petitioner should have filed his motion made under FRCP Rule 60 (b) (1) *within* a year after the district court judgment in order to have it considered timely.

This petitioner herewith adds another pertinent Ninth Circuit case, *Palomo v. Baba,* 497 F. 2d 959 (1974), from which appellant quotes, pages 959, 960:

> ". . . the district court had no power to consider the motion to vacate judgment (60b2) pending appeal from that judgment to this court."

In the Ninth Circuit Court's Memorandum the court admits there was an appeal pending (page 2) and in essence is stating that petitioner was actually barred from using a motion made under Rule 60 (b) (1) after appellate review. Petitioner quotes further from *Palomo v. Baba* at page 960:

> "While the district court had jurisdiction to act on the Rule 60 (b) motion after its judgment had been affirmed, and after it had received the mandate from this court, as to all matters encompassed by the mandate, such jurisdiction rested on conformance with mandate."

What did the mandate from the Ninth Circuit Court state that was the subject for review in the Petition for Writ of Certiorari, Supreme Court, No. 74-1135, App. A?

> "Upon consideration of appellees' motion and the opposition thereto, the appeal herein is dismissed for failure to cause the record to be filed timely. Rule 12 (c) FRAP."

This petitioner cannot see that if district court had made findings of fact and conclusions of law, that district court would be acting again on matters encompassed by the above stated mandate. See *Lohman v. Gen. Am. Insurance,* 478 F. 2d 719, 722, 723 (Eighth Cir. 1973) CT 177.

For district court's judgment see Petition for Writ of Certiorari, Supreme Court, No. 74-1135, page viii. The order of dismissal is at page x.

V

Quoting from the Memorandum pages 1 and 2:

> "Plaintiff's reliance on Fed.R. Civ. P. 52 (a) is misplaced. His action was dismissed prior to trial. Under these circumstances, the rule does not require the court to make findings of fact and conclusions of law. Its failure to do so was not an abuse of discretion."

In the *Schepp v. Langmade* case the appellate court found that the district court had made findings of fact and conclusions of law. In this case this appellate court found that district court failed to make findings of fact and conclusions of law, but excused district court's failure to make findings of fact and conclusions of law because findings of fact and conclusions of law are not required "prior to trial" because FRCP Rule 52 (a) cited by this appellant does not require findings of fact and conclusions of law be made prior to trial; and therefore district court did not abuse its discretion in not making them. This petitioner not only cited 52 (a) in his brief, page 5, but also cited FRCP Rule 41 (b) and FRCP Rule 78. FRCP Rule 52 (a) states, quoting applicable part:

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b)."

What does Rule 41 (b) (Titled) Involuntary Dismissal say? CT 166, quoting applicable part:

> "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

District court rendered its decision concerning petitioner's motion made under 60 (b)(1) and (6) based on the grounds "the court being fully advised". The

appellate court stated district court failed to make Findings of Fact and Conclusions of Law. It appears that district court has abused its discretion in not making them.

VI

In its Memorandum, page 1, the court said:

> "Insofar as it was made under Rule 60 (b) (6), it did not meet the standards for the granting of such extraordinary relief."

This petitioner is unaware of what the standards are that the appellate court is referring to that this petitioner has not met. Petitioner quotes FRCP Rule 60 (b), applicable part (CT 155):

> "On motion and upon such terms as are just the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, . . . or (6) any other reason justifying relief from the operation of the judgment . . ."

It is clear that district court's judgment was based on the Order of Dismissal; but what were the reasons for the dismissal? In the Reporter's Transcript of the May 28, 1974 hearing, page 12, line 10, the court stated as follows:

> "I dismissed it under Rule 12 (b) (6), didn't I?"

At page 12, line 18:

> "I made my statement, the case is dismissed under 12 (b) (6). I think the matter's res judicata."

At CT 100 the court signed the Order granting motion to dismiss action "on the grounds that all claims stated in said action are *res judicata.*" No Findings of Fact or Conclusions of Law were included in the Order.

This petitioner states that whether the reason for dismissal was 12 (b) (6) or res judicata was good cause for use of the 60 (b) (6) provision quoting as follows:

> "any other reason justifying relief from the operation of the judgment."

At AB 5 FRCP Rule 78 states that an action is a hearing on a motion.

At CT 157, lines 18-21, petitioner quoted FRCP Rule 52 (a).

At CT 166, lines 17-24, petitioner quoted FRCP Rule 41 (b) plus an excerpt from FRCP Rule 52 (a), endeavoring to show district court it was required to make Findings of Fact and Conclusions of Law; and if the court had made Findings of Fact and Conclusions of Law, this petitioner believed the Findings of Fact and Conclusions of Law would not support the Order of Dismissal. In its Memorandum the appellate court found that district court failed to make Findings of Fact and Conclusions of Law.

Appellant believes the district court's Order of Dismissal makes the judgment cloudy. In the case ***Maryland v. Baltimore Radio Station,*** 94 L. Ed. 562 Justice Frankfurter discussed the reasons for the Supreme Court decision "hearing denied with no rea-

sons stated." One of them is if the lower court decision is "cloudy" it needs to be further "illumined".

Concerning res judicata at CT 158, line 21 et seq., this petitioner believes he showed that the interpretation of the California Constitution contract clause in existence when this petitioner filed his Amended Complaint, Cal. Const., Art. I. Section 16, "No law impairing the obligation of contracts shall ever be passed," was not the same as the interpretation of the United States Constitution contract clause, U. S. Const., Art. I, Section 10 (1) "No state shall pass any law impairing the obligation of contracts." The California State Court of Appeal in the case *Packard v. Ginochio,* see Petition for Writ of Certiorari, App. "J", interpreted Cal. Const., Art. I, Section 16, to mean "it prescribes the enactment of any law impairing the obligation of contracts". This petitioner interpreted U. S. Const., Art. I (10) (1), CT 158, line 32 and CT 159, lines 1 and 2, to mean it protects and secures petitioner's immunity from impairment of the obligation of contract by respondents impairing their obligations under color of laws.

Further going into more detail, petitioner at CT 159, lines 22 et seq., discussed the interpretation of the word "pass" as it is used as a verb transitively in U. S. Const., Art. I (10) (1), from 4 dictionaries to mean "sanction". In contrast at CT 55, lines 22 et seq., the word "passed" in Cal. Const., Art. I, Section 16, is used as a verb intransitively and means "make valid". To further show that this case in federal court is not res judicata because of petitioner's

state court cases based on Cal. Const., Art. I, Section 16, Petitioner is pleading U. S. Const., Art. I (10) (1) in this federal court action.

Respondents' defense is based primarily on their contention that U. S. Const., Art. I (10) (1) and Cal. Const., Art. I, Section 16, are the same; and because petitioner had his state court cases dismissed because Cal. Const., Art. I, Section 16, did not prohibit respondents from impairing their obligations under color of laws, petitioner should get the same treatment here in federal court. With district court not making any Findings of Fact and Conclusions of Law and the appellate court saying petitioner's motion made under 60 (b) (6) "did not meet the standards for granting of such extraordinary relief" all respondents have to do is sit back and do nothing to prove their contention that the matter is res judicata.

The cases cited by respondents at CT 91 to try to prove their contention "It is settled law in California that the contract clause of the State Constitution is given substantically (sic) identical interpretation to the Federal provision, and indeed, the two clauses and principles thereunder are frequently intermixed without distinction." do not prove respondents' contention, and this petitioner stated they did not at CT 134, lines 18-22. District court ignored the issue. Just the citation of the cases is not enough to show proof of respondents' contention of res judicata.

At CT 167, lines 27, 28, petitioner discussed 12 (b) (6) "the complaint does not state facts upon which relief can be granted." The Amended Complaint

stated defendants were impairing petitioner's obligations concerning his contracts. If defendants were impairing petitioner's obligations, using the interpretation of the word impair to mean diminish, CT 3, lines 7, 8; CT 159, line 23, defendants would be diminishing petitioner's obligations concerning his contracts; and the facts do not show this situation to exist. Petitioner is now claiming respondents are impairing their obligations under color of laws. Petitioner recognized he made a mistake in his A/C pleadings, has submitted his corrections, CT 168, lines 1-28, and by means of a motion made under Rule 60 (b) (1) mistake, the district court abused its discretion in not recognizing that petitioner made a mistake in his A/C pleadings.

At CT 167, line 32, petitioner cited *Cobb v. City of Malden,* 202 F.2d 701, to show that the teachers made the same pleading mistake as this petitioner did. At page 705, ¶ 8, quoting:

> "It is alleged that these defendants in furtherance of a conspiracy, deprived plaintiffs of their constitutional rights by employing state law to abrogate plaintiff's contract obligations."

In his Petition for Rehearing petitioner also cited the case *So. Terminal v. E.P.A.,* 504 F.2d 646, 680 (1st Cir. 1974) to show that nine attorneys also made the same pleading mistake as this petitioner did, and the court commented on it at pages 679, 680 quoting:

> "The claim of the airport petitioners is in two parts: first, that they have let a construction contract for the South Terminal garage, and that

> the value of that contract to petitioners will be reduced if all of the spaces in the garage cannot be used; second, that Massport and associated concerns have contracts with airlines and with bondholders under indentures, and that these contracts will become less valuable to the bondholders and airlines because Massport and South Terminal, deprived of anticipated parking revenue, will be less likely to keep up payments as called for.
>
> The contentions prove too much. Were they accepted, all governmental action affecting the profitability of private concerns would violate the contracts clause because it would change relative values and make those enterprises the prospects of which were diminished by the legislation somewhat less likely to keep their bargains. We do not understand that this is the import of the contracts clause. We read it as forbidding instead an alteration in the relative position of two parties to an existing contract; once these parties, as between themselves, have allocated rights and responsibilities, it is not within the power of the government to rearrange them. (citing) Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428, 54 S.Ct. 231, 78 L. Ed. 413 (1934). . . . But this sort of alteration of relative obligations is considerably different from the 'diminished profitability and therefore diminished ability to keep up obligations' argument made by petitioners."

Incidentally, this petitioner believes 1st Circuit's interpretation above of the contract clause of the United States Constitution should be clarified further. This petitioner believes it should be "prohibits any party

to an existing contract from impairing that party's obligations under color of law." Petitioner cites following cases to back his interpretation. The applicability of these cases is discussed in the record.

CT 161, *State of New Jersey v. Wilson,* 3 L.Ed. 303 (1812);

CT 162, *Murray v. Charlestown,* 24 L.Ed. 760 (1878);

CT 163, *Coolidge v. Long,* 75 L.Ed. 562 (1930);

CT 164, *Wichita RR. and Light Co. v. PUC of Kansas,* 67 L.Ed. 124 (1922);

CT 165, *Arkansas Nat. Gas Co. v. Ark. RR. Comm.,* 67 L.Ed. 705 (1923).

At CT 160, line 32, CT 161, lines 1-12, petitioner presented his "five lbs. for a dollar test" which shows by means of mathematics who is impairing whose obligation when the "boss" raises the rates on a contract. Quoting from CT 161, 162:

> "You order 5 lbs. for a dollar. When the delivery is made you receive the five lbs. and a bill for one dollar and twenty-five cents. The excuse is the boss just raised the rates 25% because it is customary and everybody is doing it. Who is impairing whose obligation? The boss is impairing his obligation by increasing the rate to 4 lbs. for a dollar and diminishing the value of the contract to you of five lbs. for a dollar. The boss has made a law changing the rate as far as you are concerned; . . ."
>
> Note: 4 lbs. for a dollar is 25¢ per lb. You ordered 5 lbs. for a dollar which is 20¢ per lb. 5 lbs. for one dollar and twenty-five cents is 25¢ per lb.

This petitioner believes he has met the standards for granting extraordinary relief from respondents impairing their obligations under color of laws concerning petitioner's contracts; and district court's judgment and Order of Dismissal should be vacated.

VII

Concerning USCA Title 42-1983 and USCA Title 18-242 petitioner cited at CT 71, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) and at CT 58, *Lynch v. Household Finance Corp.,* 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972). Although petitioner did not cite these cases for above cited sections, these cases do contain reference to 42-1983.

In the *Lynch* case a state law was used under the color of which to garnishee Mrs. Lynch's bank account before court jurisdiction had been officially established. The lower court had made no decision on the merits of the case and dismissed it. Under the provisions of 42-1983 this Supreme Court reversed and remanded because the 14th Amendment to the United States Constitution prohibited garnishment of a bank account without due process.

In the *Bivens* case under the color (authority) of Federal narcotic laws Federal agents performed an illegal entry and search and arrest without warrant prohibited by the 4th Amendment to the United States Constitution. Bivens was authorized to proceed

against the Federal agents under the provisions of 42-1983. Damages also were awarded.

In this case petitioner claims all respondents are violating United States Constitution Art. I (10) (1) under color of state laws, ordinances and regulations. This petitioner is endeavoring to proceed against respondents under provisions of 42-1983 with 18-242 as the remedy. District court's jurisdiction is 28-1343 (3) and (4) CT 168, 169.

Since *Bivens* it is hoped that the members of the Supreme Court of the United States now realize there is also a federal remedy provided by Congress for violation of United States Constitution provisions under color of laws; i.e., USCA Title 18-242. See CT 170, lines 17-20. Also CT 169 and 170 for detailed application of 18-242 to respondents. Petitioner quotes USCA Title 18-242 in full (Titled) Deprivation of rights under color of law:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."
>
> (As amended Apr. 11, 1968, Pub.L 90-284, Title I, § 103 (b), 82 Stat. 75.)

From a reading of above quoted section this petitioner believes it is the remedy provided by Congress not realized to be in existence by members of the United States Supreme Court in *Bivens*.

It is to be noted that in *Lynch* Justice Stewart mentioned USCA Title 18-242 at 92 S.Ct. page 1118, Note 9, and page 1120, Note 16.

Wherefore Petitioner Prays that this Supreme Court:

1. Declare petitioner's motion made under FRCP Rule 60 (b) (1) is timely.

2. Allow the corrections to petitioner's Amended Complaint.

3. Recognize petitioner's reasons under FRCP 60 (b) (6) have merit.

4. Recognize petitioner has contracts that are administered by respondents: and that the new rates and charges and taxes respondents are applying to petitioner's contracts are actually for contracts consummated after the effective date of the new rates and charges and taxes—not for petitioner's contracts in existence prior to the effective date of the new rates and charges and taxes.

5. Recognize and declare that there is a substantial difference between the interpretation of the United States Constitution contract clause and the interpretation of the California State Constitution contract clause.

6. Recognize that USCA Title 18-242 is a remedy for violation of United States Constitution provi-

sions; and that petitioner's method of computing damages of this case is proper.

7. Remand this case to district court to vacate its judgment and Order of Dismissal and make Findings of Fact and Conclusions of Law; or as an alternative, remand with an Order to district court to follow the instructions in petitioner's appellate court Brief at page 8.

Dated: June 11, 1976.

JAMES B. PACKARD,
Petitioner In Propria Persona.

(Appendix Follows)

APPENDIX

Appendix

In the United States Court of Appeals
for the Ninth Circuit

No. 75-2752

James B. Packard,
Plaintiff-Appellant,

vs.

Kenneth Welch, Robert Hunter, Dennis Scherzinger, Robert Mullikin, and Robert Whyte,
Defendants-Appellees.

[Filed May 12, 1976]

ORDER

Before: BARNES, BROWNING and WRIGHT,
Circuit Judges.

Appellant's Petition for Rehearing has been considered and is denied.

The court has also considered the appellees' Motion for Attorney's Fees. It, too, is denied.

Dated: May 10, 1976.

United States Court of Appeals
for the Ninth Circuit

No. 75-2752

James B. Packard,
Plaintiff-Appellant,
vs.
Kenneth Welch, Robert Hunter, Dennis Scherzinger, Robert Mullikin, and Robert Whyte,
Defendants-Appellees.

[Filed Apr. 15, 1976]

MEMORANDUM

On Appeal from the United States District Court
for the Eastern District of California

Before: BARNES, BROWNING and WRIGHT,
Circuit Judges

Plaintiff appeals from the denial of his motion to vacate an order of the district court which dismissed his action. This court has jurisdiction under 28 U.S.C. § 1291.

It is well settled that the grant or denial of a motion to vacate a prior order pursuant to Fed. R. Civ. P. 60(b) is within the sound discretion of the district court and will only be set aside for abuse of discretion. *Schepp v. Langmade*, 416 F.2d 276, 279 (9th Cir. 1969). We find no such abuse.

Plaintiff's motion, insofar as it was made under Rule 60(b)(1), was untimely since it came more than one year after the entry of the original order. Insofar as it was made under Rule 60(b)(6), it did not meet the standards for the granting of such extraordinary relief.

Plaintiff's reliance on Fed. R. Civ. P. 52(a) is misplaced. His action was dismissed prior to trial. Under these circumstances, the rule does not require the court to make findings of facts and conclusions of law. Its failure to do so was not an abuse of discretion.

The record indicates that plaintiff, having unsuccessfully sought redress before this court and before the Supreme Court, returned to the district court for one more try. Rule 60(b) is not a substitute for appellate review.

The order of the district court denying vacation of the dismissal is affirmed.

United States District Court
Eastern District of California

No. S-2978

James B. Packard,
Plaintiff,

vs.

Kenneth Welch, Treasurer;
Robert Hunter, Water Superintendent;
Dennis Scherzinger, Manager;
Robert Mullikin, Manager; and
Robert White, Manager,
Defendants.

[Filed Jul. 7, 1975]

ORDER DENYING MOTION TO VACATE AND SET ASIDE JUDGMENT AND ORDER GRANTING MOTIONS TO DISMISS ACTION

The motion of plainiff for an order to vacate and set aside judgment and order granting motions to dismiss action having come on for hearing this date, and the Court being fully advised,

It Is Ordered, that said motion, as against all defendants, is hereby DENIED.

Dated: July 7, 1975

Philip C. Wilkins
United States District Judge